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No. 89-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EXXON CORPORATION,
Petitioner,

vs.

WYOMING STATE BOARD OF EQUALIZATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WYOMING SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Exxon Corporation ("Exxon") respectfully submits this brief in support of its petition for writ of certiorari.

RULE 29.1 STATEMENT

The list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Exxon required by Rule 29.1 is set forth as Appendix D to Exxon's petition for writ of certiorari at A-31 through A-40.

I. THE CIRCUMSTANCES GIVING RISE TO THIS CASE ARE NOT UNIQUE.

In its Brief in Opposition to Petition for Writ of Certiorari (the "Brief in Opposition"), Respondent Wyoming State Board of Equalization (the "Board") asserts that the circumstances of this case are "unique." Brief in Opposition at 6. This assertion is wrong. At the hearing before the Board, a representative of the Wyoming Department of Revenue and Taxation (the "Department") was asked

whether the Department ever had a circumstance similar to the one in this case. The representative answered as follows:

> Yes, we have. We've had many. Not ever for this particular dollar amount, but we've had — we have them every day. We have contractors making purchases subject to use tax in another state that are not allowed the credit and assessments are being issued to those contractors.

Transcript of Hearing Proceedings Before the Wyoming State Board of Equalization in the Matter of the Appeal of Exxon Company, U.S.A. (Docket A-87-11), October 27, 1987 (the "Transcript") at 71-72.

As this testimony demonstrates, the circumstances of this case are hardly unique. This Court should grant Exxon's petition for writ of certiorari in order to provide guidance to taxpayers and the state of Wyoming with respect to the constitutional issues involved in these "every day" transactions.

II. THE COLORADO TAX PAID BY EXXON WAS LEGALLY REQUIRED TO BE PAID UNDER COLORADO LAW.

In the Brief in Opposition, the Board repeatedly asserts that Exxon "voluntarily" paid tax to the state of Colorado on the purchase price of the pipe that is at issue in this case. Brief in Opposition at 1, 3, 9, and 13. The use of the term "voluntary" in this context is misleading. Exxon was required by Colorado law to report and pay tax with respect to the pipe, and failure to do so would have exposed Exxon to significant civil or possibly even criminal penalties under Colorado law. Under the circumstances, Exxon's compliance with its statutory obligation under Colorado law can hardly be termed "voluntary."

The Board also asserts that the Wyoming Supreme Court essentially concluded that the Colorado tax paid by Exxon was not valid. Brief in Opposition at 4 fn.1. This is simply not true. The Wyoming Supreme Court did not address the question of whether the Colorado tax paid by Exxon was valid. Petition for Writ of Certiorari, Appendix A at A-9. The Board itself, in its Order in this case, assumed that the Colorado tax was legally imposed. Petition for Writ of Certiorari, Appendix B at A-27. Neither the decision of the Wyoming Supreme Court nor the decision of the Board contains any

finding that the Colorado tax paid by Exxon was invalid, and neither decision depends upon such a finding for its conclusion that Wyoming was not required to grant a credit against its use tax for the Colorado tax paid by Exxon.

The Colorado tax paid by Exxon was legally imposed and was required to be paid under Colorado law. *See* Brief of Amici Curiae States of Colorado and New Mexico at 5; Colo. Rev. Stat. § 39-26-201(3) (1982). At the hearing before the Board, counsel for the Department stated, with respect to the Colorado tax paid by Exxon: "We're not saying that Colorado is wrong under their statute. Their statute happens to be fairly clear." Transcript at 77. Later, counsel for the Department stated: "But Colorado, whether we like it or not, can impose a tax on that activity [that took place in Colorado in this case]." Transcript at 79. The Board's attempt in its Brief in Opposition to transform this case into one in which the taxpayer seeks a credit for a tax illegally or improperly paid to another state does not reflect the actual facts upon which the Board and the Wyoming Supreme Court decided this case.

III. WYOMING'S USE TAX IS NOT FAIRLY APPORTIONED.

In the Brief in Opposition, the Board argues that the Wyoming use tax is fairly apportioned because, by administrative interpretation, the tax applies only to the "first use" of property (as defined by Wyoming law), and such "first use" can occur in only one state. Brief in Opposition at 11-12. This argument ignores the reality in this case that Colorado also imposed a tax (found by the Wyoming Supreme Court to be a *use* tax) on the activities of Exxon with respect to the pipe in Colorado. In essence, the Board argues that each state may define the taxable event under its use tax statute in a different way, even if the result of such varying definitions is the imposition of multiple use taxes on a single item of property. Whatever the validity of Wyoming's argument that such use taxes would each be internally consistent, the practical effect of Wyoming's argument — as demonstrated by the facts of this case — is the imposition of multiple use taxes against the full purchase price of the item of property when the item of property moves through interstate commerce. Such taxes are not externally consistent unless they contain some mechanism to apportion the tax base among the various states in which the taxable activity occurs. Colorado (and most other states) provide this apportionment mechanism through credits for similar taxes previously

paid to other states. Wyoming does not provide for such a credit, and its failure to provide some mechanism to ensure fair apportionment violates the external consistency test articulated by this Court in analyzing state taxes under the Commerce Clause of the United States Constitution. *Goldberg* v. *Sweet*, 109 S.Ct. 582, 589 (1989).

Moreover, the Board's argument completely ignores the nature and practical effects of the sales and use tax system that is at issue in this case. In another part of its Brief in Opposition, the Board correctly argues that Wyoming's use tax is complementary to its sales tax. Brief in Opposition at 15. Thus, Wyoming's use tax is not imposed in addition to its sales tax, but rather is imposed only where an item has not been subjected to Wyoming's sales tax. Colorado's use tax is similarly complementary to Colorado's sales tax. Exxon has been required to pay a tax to Wyoming that is complementary to Wyoming's sales tax, without credit for a tax paid to Colorado under a virtually identical sales and use tax scheme. The payment of two sales or complementary use taxes when only one sale has occurred demonstrates the failure of Wyoming's tax scheme to provide a mechanism to apportion its use tax.

IV. THE BOARD'S BRIEF DEMONSTRATES THE DISCRIMINATION AGAINST INTERSTATE COMMERCE THAT RESULTS FROM WYOMING'S USE TAX SCHEME.

In its Brief in Opposition, the Board attempts to demonstrate the absence of discrimination against interstate commerce by describing a situation in which Exxon hypothetically purchases pipe in Wyoming and then transports the pipe to Colorado for coating before returning the pipe to Wyoming for installation. Brief in Opposition at 15-16. The Board notes that a single Wyoming sales tax would have been paid in that situation. In essence, the Board contends that Exxon should have purchased the pipe in Wyoming rather than out-of-state. Thus, by its own admission, the Board seeks to force Exxon (and similarly situated taxpayers) to purchase goods in Wyoming rather than in other states. This attempt to provide a direct commercial advantage to local businesses is sufficient to hold the Wyoming use tax scheme unconstitutional as discriminatory against interstate commerce. *See Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318 (1977).

CONCLUSION

Based on the foregoing, Exxon's petition for writ of certiorari should be granted.

Respectfully submitted,

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